actually in the warehouse business, other than the owner of the goods,[9] and the transaction must be free from any suggestion of sham.[10]

The recent case of *Taney* v. *Penn National Bank of Reading* (1914) 34 Sup. Ct. Rep. 288,[11] marks the present limit in the adaptation of established rules of law to needs of trade. In that case, the Supreme Court held that the handing over as collateral security of a distiller's receipt for whisky then stored in his bonded warehouse, was a sufficient delivery to constitute a pledge valid against the distiller's trustee in bankruptcy,[12] since no creditors had been in fact misled, and the goods, which it was impracticable to store elsewhere, were under the complete control of the Government.[13] Government possession, however, while immune from disturbance before payment of the tax by the distiller,[14] is rather in the nature of a joint custody over the warehouse with but incidental control over its contents, which may be terminated at any time by the distiller upon payment of the levy.[15] But the Government, in this case, having neither issued receipts for the spirits nor attorned to the pledgee, had made no delivery, while the receipt of the distiller, as failing to restrain further acts of dominion by him, was not only invalid as a document of title but hazardous as a security.[16] The decision of the principal case, therefore, must be based not upon the technical law of pledges, but upon the practical policy of enabling a release of capital for further production by giving effect to the established custom of a particular trade, and should be confined to the particular facts.

FUNCTIONS OF COURT AND JURY IN NEGLIGENCE CASES.—A peculiar development of the law is found in the general practice of allowing the jury to pass upon the issue of negligence, which, upon undisputed facts, is essentially a question of law.[1] It is almost universally held,

[9]Tradesman's Bank *v.* Jagode (1898) 186 Pa. 556; Fourth St. Nat. Bank *v.* Millbourne Mills, *supra.*

[10]A pledgee must have exclusive possession, Collins *v.* Buck (1874) 63 Me. 459, and if the bankrupt pledgor has had actual control over the property, this evident subterfuge makes a pledge impossible. Security Warehousing Co. *v.* Hand (1907) 206 U. S. 415.

[11]See also the opinions of the lower courts. (D. C. 1910) 176 Fed. 606; (C. C. A. 1911) 187 Fed. 689.

[12]The inquiry must be limited to the sufficiency of the delivery, and in this connection the equitable rights of the parties are not changed by the commencement of bankruptcy proceedings, Hurley *v.* Atchison, T. & S. F. Ry. (1909) 213 U. S. 126, although the trustee now has the lien of a judgment creditor. See 13 Columbia Law Rev. 158.

[13]A similar transaction was held to create simply an equitable lien. Pattison *v.* Dale (C. C. A. 1912) 196 Fed. 5.

[14]McCullough *v.* Large (C. C. 1884) 20 Fed. 309.

[15]United States *v.* 36 Barrels of High Wines (U. S. C. C. 1870) 7 Blatch. 459; see Rev. Stat. 3271 (U. S. Comp. Stat. 1901, p. 2122).

[16]See *In re* Rohrer (D. C. 1911) 186 Fed. 997, which must be considered overruled by the principal case; Loveland, Bankruptcy, § 479; see notes 14, 15, *supra.*

[1]1Chamberlayne, Evidence § 123; 9 Columbia Law Rev. 156. Proximate cause, however, is generally regarded as an inquiry of fact to be left to the jury. See Davis *v.* N. Y. C. & H. R. R. R. (1872) 47 N. Y. 400.

however, in accord with the decision in the recent case of *Tousley* v. *Pacific Electric Ry.* (Cal. 1913) 137 Pac. 31, that where the standard of conduct required is that of an ordinary prudent man, the court, if it decides upon all the evidence that reasonable men may reach different conclusions, should leave to the jury the final determination of the existence of negligence.[2] Consequently, the province of the judge is limited to cases: first, where the evidence is such that a contrary verdict reached by the jury would be set aside; and second, where specific acts are defined by the law as the standard of care appropriate to the circumstances under consideration.[3] This apportionment of the issue of negligence between court and jury apparently rests more upon consideration of policy than upon principle. The underlying theory is that in as much as the jury is as capable of deciding how a reasonable man would act under certain conditions, it is equally capable of deciding the troublesome question of whether the conduct in issue was a breach of the duty of ordinary care.[4] It seems very true that since the standard of care rests in experience, its determination is as well within the scope of the layman as of the trained judicial mind, and consequently, as just results are obtained by adopting the conclusions of the jury because of the diversity of common knowledge reflected in their determination.

Mr. Justice Holmes, speaking for the court in *Lorenzo* v. *Wirth*[5] voiced a protest against this departure from principle. His position is that the law in every case fixes as a standard, the care usually exercised by a reasonably prudent man, so whenever the facts are clear it is the duty of the court to apply this test which the law prescribes.[6] But he further contends that if the facts are in dispute, since the jury must decide what actually occurred, it is justifiable, but only as a matter of convenience, to leave to them the entire question under proper instruction as to the law.[7] This view, which is best exemplified by the treatment of the issue of lack of probable cause in actions for malicious prosecution,[8] is undoubtedly sound on principle; for it is clearly inconsistent to permit the court to decide upon the presence of negligence in circumstances where reasonable men cannot differ and to deny that it can render judgment upon the very same issues in a close case when the application of the law to the facts becomes more difficult. An additional advantage, moreover, of a judicial determina-

[2]Pollock, Torts (8th ed.) 448; see McCully *v.* Clarke & Thaw (1861) 40 Pa. 399.

[3]Burdick, Torts (2nd ed.) 428; 1 Chamberlayne, Evidence § 125; see Solomon *v.* Manhattan Ry. (1886) 103 N. Y. 437; Elliott *v.* Chicago, M. & St. P. Ry. (1893) 150 U. S. 245.

[4]See 9 Columbia Law Rev. 158.

[5](1898) 170 Mass. 596.

[6]12 Harvard Law Rev. 443, 457. Indeed, in many cases the legal test of reasonableness is applied by the court to undisputed facts. Comer *v.* Way (1896) 107 Ala. 300. Earnshaw *v.* United States (1892) 146 U. S. 60, 67.

[7]12 Harvard Law Rev. 458; and see the special concurring opinion delivered by Mr. Justice Holmes in LeRoy Fibre Co. *v.* Milwaukee, & St. P. Ry. (U. S. Sup. Ct. Feb. 24, 1914. Not yet reported.)

[8]Stewart *v.* Sonneborn (1878) 98 U. S. 187, 194; Stone *v.* Crocker (Mass. 1832) 24 Pick. 81; Besson *v.* Southard (1851) 10 N. Y. 236; *cf.* Lister *v.* Perryman (1870) L. R. 4 Eng. & Ir. App. Cas. 521.

tion of such questions is the acquisition of a line of precedent and the consequent certainty in this field of the law.

Despite the broad assertion of the cases, however, limiting the court's function in negligence actions to deciding simply the questions upon which reasonable men could entertain no difference of opinion, as a practical matter, the court often assumes a greater authority, so that in actual operation both views tend to almost the same result.[9] Indeed, the growth of the rule that one who approaches a railroad crossing without looking and listening is negligent as a matter of law,[10] from a number of holdings that under such circumstances reasonable men could not differ, is an unconscious evolution of the principle which treats lack of reasonable care upon settled facts as a question of law.[11]

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[9]Craft *v.* Metropolitan Ry. (1866) L. R. 1 C. P. *300.

[10]Beach, Contributory Negligence § 63; 3 Elliott, Railroads (2nd ed.) § 1166; Aiken *v.* Pennsylvania R. R. (1889) 130 Pa. 380; N. Y. & S. W. R. R. *v.* Thierer (C. C. A. 1913) 209 Fed. 316; Rodrian *v.* New York, etc. Ry. (1891) 125 N. Y. 526. The negligence of the pedestrian in failing to look and listen cannot generally be excused by the conduct of the railroad. 6 Columbia Law Rev. 472; *cf.* Talley *v.* Southern Ry. (N. C. 1913) 80 S. E. 44.

[11]The United States Supreme Court has recently held that, as a matter of law, one who maintains very inflamable goods on his own premises within 100 feet of a railroad cannot be contributorily negligent, so as to relieve the railroad from liability for damages from fire caused by sparks emitted through the negligence of an employee. LeRoy Fiber Co. *v.* Milwaukee, & St. P. Ry., *supra.*